IN RE ARBITRATION BETWEEN:

POLICE OFFICERS FEDERATION OF MINNEAPOLIS

and

CITY OF MINNEAPOLIS

DECISION AND AWARD OF ARBITRATOR

JEFFREY W. JACOBS

ARBITRATOR

December 30, 2015

IN RE ARBITRATION BETWEEN:

Police Officers Federation of Minneapolis

and

DECISION AND AWARD OF ARBITRATOR
Dante Dean Grievance

City of Minneapolis

APPEARANCES:

FOR THE EMPLOYER:

Mike Bloom, Attorney for the Employer
Travis Glampe, Deputy Chief

FOR THE UNION:

Joseph Kelly, Attorney for the Union
Dante Dean, grievant
Lt. Robert Kroll, Federation President

PRELIMINARY STATEMENT

Hearings in the above matter were held on November 19, 2015 at the Minneapolis City Attorney's Office at City Hall in Minneapolis, MN. The parties presented oral and documentary evidence and the record was closed the parties submitted post-hearing briefs on December 14, 2015.

CONTRACTUAL JURISDICTION

The parties' collective bargaining agreement provides for binding arbitration of disputes. The arbitrator was selected from a list maintained by the parties. The parties stipulated that there were no procedural or substantive arbitrability issues and the matter was properly before the arbitrator.

ISSUE PRESENTED

Was there just cause for the 10-hour suspension of the grievant? If not, what shall the remedy be?

RELEVANT CONTRACTUAL AND POLICY PROVISIONS

Section 4.1

Section 4.1 The City, through the Chief of the Minneapolis Police Department or his/her designee, will discipline employees who have completed the required probationary period only for just cause.

4-411 ACCIDENT REVIEW COMMITTEE

...If a second accident occurs within a one-year time period, the employee shall be required to attend a remedial driver's training course at City expense. In the event a third accident occurs within one year

of completion of the remedial drivers training course, the accident will be categorized (B-D) and an IAU investigation will be conducted.

Policy 7-103 PRIORITY CALL CODE NUMBERS AND PROCEDURES

Call code numbers are used by dispatchers and officers to indicate the seriousness of an incident and the procedures for response. The responsibility for determining the appropriate call code number rests with the responding officer based upon information communicated from the MECC or other personnel.

- CODE ONE: Indicates that an officer cannot be located or does not answer the radio.
- CODE TWO: A call to be answered or situation to be handled immediately. The red lights and siren shall not be used and all traffic laws will be obeyed.
- CODE THREE: EMERGENCY SITUATION - To be answered immediately, but in a manner enabling the responding units to reach the scene as quickly and safely as possible. MS 169.03 and 169.17 require the use of red lights and siren for emergency driving.
- CODE FOUR: Situation is under control. Responding squads that have not arrived may clear.

7-403 VEHICLES - EMERGENCY RESPONSE (10/12/01)

Only police vehicles with lights and sirens are authorized for emergency response. All MPD officers shall use red lights and sirens in a continuous manner for any emergency driving. Officers responding to a Code 3 emergency shall exercise caution and due consideration for the safety of the public. Although Minn. Stat. §169.03 and 169.17 exempts officers from traffic statutes, the use of the red lights and siren does not exempt officers from the need for caution nor does it exempt them from criminal or civil liability. Officers driving low profile, unmarked, motorcycles, or other MPD vehicles should be particularly aware of the less visible nature of the emergency equipment in/on the vehicle and should use extra caution.

Officers are advised that circumventing light rail intersection crossing arms is a very dangerous practice. Officers going around the light rail crossing arms when they are down causes the light rail train operator to emergency brake the light rail car. When the light rail car is emergency braked, it causes passengers to be ejected from their seats and thrown to the floor, which could cause serious injury or death. Due to these risks, officers are prohibited from going around the light rail crossing arms when they are down at an intersection.

PARTIES' POSITIONS

DEPARTMENT'S POSITION

The department took the position that there was just cause for the issuance of a suspension for the grievant's actions herein. In support of this position, the employer made the following contentions:

1. The employer noted that the facts are virtually undisputed and established conclusively that the grievant violated clear department policy by failing to use his siren consistently when responding to an emergency call.

2. The department noted that the grievant was called to respond to an emergency call of an assault in progress and was proceeding up Cedar Avenue in south Minneapolis on the date in question, May 4, 2014, but failed to use his siren as the policy, 7-403 clearly requires. The department noted that, as all police departments are, the Minneapolis Police Department is a paramilitary organization where orders are orders and are to be followed without question to the letter. That policy requires that when responding to an emergency, siren and lights are to be used continuously – not intermittently at the discretion of the officer.

3. The department also noted that the policy is consistent with the requirements of state law. Minn. Stat 169.09 subd. 2 allows law enforcement officers to proceed through certain traffic control devices when responding to an emergency but further requires that "a law enforcement vehicle responding to an emergency call shall sound its siren or display at least one lighted red light to the front." As a law enforcement officer, the grievant was expected to know this rule and follow it as well.

4. The grievant admitted that he used his siren intermittently – a fact that is quite obvious from a review of the dashboard camera showing the events immediately before the collision that occurred here. The department also argued that had the grievant used his siren properly he might well have been able to avoid the collision between another vehicle and his squad vehicle – which of course caused him to miss getting to the scene of what could well have been a very serious felony in progress.

5. The department argued that the grievant knew of the rule yet decided to violate it in order to possibly not scare the assailant away. The department posited that the policy does not allow for the officer to decide whether to follow this clear standing order on that basis. Moreover, hearing the siren could well have caused the assailant to stop the assault.

6. The department also noted that the record shows that the grievant proceeded on Cedar Avenue, a busy thoroughfare in Minneapolis at approximately 48 MPH despite the posted speed limit of 30 MPH.

7. While the speed itself alone was not the issue, the department argued that the excessive speed was all the more reason to sound the siren per policy in order to warn other drivers of his approach and to avoid the very crash that eventually occurred. Sounding the siren as he was required to might well have alerted the young driver who pulled out in front of an intersection and collided with the grievant's vehicle of his approach. Failure to do so can be presumed to have contributed to this crash and the grievant's inability to respond to an assault in progress.

8. The department also noted that the grievant has had at least two other "preventable" accidents in the preceding six months, see Department Exhibits 5 and 11, and that this accident was also determined to have been preventable. The department argued that his driving history shows a lack of attention to policy and that appropriate discipline must be administered to impress upon the grievant the need to follow procedure for the safety of everyone, including the public.

9. The department also noted that the grievant was injured as the result of the crash and that it was simply fortunate that no one else either in the other vehicle or standing on the street was injured due to the grievant's failure to follow procedure in this matter.

10. The department further argued that there is no question at all that there was just cause for discipline. The policy and state law are clear, the grievant, a 20 year veteran of the Minneapolis Police Department, knew of the rule and of the need to follow it and he admitted in the Garret hearing that he failed to use his siren continuously as the policy requires.

11. The department argued too that there was ample cause for the 10-hour suspension. The discipline matrix calls for a 10-hour suspension for this type of violation. Specifically, the Disciplinary Matrix provides that the baseline discipline for a "Lights/Siren use violation," such as was presented on these facts is a 10-hour suspension. See Department Exhibit 30.

12. While that may be adjusted up or down depending on certain aggravating or mitigating factors, the department and its witness went through the policy on administration of discipline, including the aggravating and mitigating factors present here and asserted that they essentially cancelled each other out. In other words, there were as many aggravating factors as mitigating factors so it was appropriate that the 10-hour suspension was left in place.

13. The department acknowledged that the three-person Discipline Panel, consisting of one management person and two bargaining unit members, determined that a written reprimand was sufficient in this instance but noted that ultimately theirs is only a recommendation. The Chief or her designee may alter that recommendation upon his/her review of the facts and circumstances. Deputy Chief Glampe went through the facts and the mitigating and aggravating factors and determined independently that a 10-hour suspension was appropriate given the clear violation, the injury which did occur as well as the possibility that others could have been injured and the grievant's prior preventable accidents. The department noted that both vehicles involved in the crash were not drivable following the collision and that there were pedestrians standing very close to the intersection where the crash occurred who could easily have been hurt or killed if things had gone slightly differently.

14. The department countered the claim by the federation that mitigating factors should have resulted in a reduction from the disciplinary matrix from the 10-hour suspension to a written reprimand. The disciplinary matrix does not require that discipline must start with a written or an oral reprimand. Neither does the contract provide for a reprimand in all cases. A 10-hour suspension, especially in light of such a serious violation that resulted in injurious consequences, can be imposed.

15. The matrix exists to provide clear guidance to all officers and to management alike regarding the disciplinary consequences of certain given violations. This is not only good policy but prevents allegations of favoritism or disparate treatment and assures that all are treated equally and fairly. The department noted that there was no allegation of disparate treatment here and no allegation that the grievant was the victim of discrimination or unfair treatment in this.

16. The department also hotly disputed the claim by the federation that there was an order to give the grievant a 10-hour suspension, irrespective of the facts of the matter, from a higher official even though the disciplinary panel and even Deputy Chief Glampe had recommended something far less. While there is a discrepancy in the dates on the memoranda, it is clear from the context that there was no such collusion and that the decision was made on the facts of the case and after a thorough and objective review of the facts in the matter.

17. The department further countered the claim by the federation that Deputy Chief Glampe thought that only a coaching session was necessary. While there was an e-mail in which he gave that statement it was based on an incomplete record of the case. Once all the facts were known, he legitimately changed his mind, given the prior preventable accidents in which he grievant was involved, and determined that the 10-hour suspension was appropriate.

18. Finally, the department acknowledged that the grievant is a 20 year veteran with no prior disciplinary history and several commendations for exemplary service and bravery but noted that the commendations are now more than 5 years old and that the grievant's conduct cannot be ignored or minimized given the potential for serious injury given his failure to follow clear procedure. The department also countered the claim by the union that the grievant was "just doing good police work" but using his siren intermittently. Good police work means following the policies and procedures in place to ensure effective police work but also to protect the safety of officers and the public. The grievant's violation here, in the department's view constituted a serious breach of that policy and that a 10-hour suspension was merited given the factors here.

The employer seeks an award denying the grievance in its entirety.

FEDERATION'S POSITION

The federation took the position that no discipline should have been issued at all. In support of this position the federation made the following contentions:

1. The federation asserted that the grievant is a 21 year veteran of the Minneapolis Police Force with no disciplinary history and seal commendations for exemplary service and bravery. The grievant is a long time veteran of the department who has demonstrated excellent police work over the course of more than two decades of service to the City and its citizens.

2. The federation acknowledged that the operative facts of the case were not in dispute. The grievant was working a normal shift on May 4, 2014 when he got a call to respond to an emergency of an assault in progress. That required him to drive north on Cedar Avenue in Minneapolis where the posted speed limit is 30 MPH. Due to the emergency nature of the call however he drove somewhat faster; reaching speeds of 48 MPH just prior to the collision here.

3. The federation and the grievant acknowledged that he did not use his siren continuously throughout the run up Cedar Avenue and that he used it when traffic was heavier and at intersections. The grievant asserted both in the investigative interview as well as at the hearing that as he neared the scene of the assault he determined to use his siren sparingly in order not to chase the assailant way. He decided that this might give him a better chance of apprehending the perpetrator and make an arrest. The federation characterized this as simply good police work and an officer using his best discretion out on the street, where policy sometimes does not fit each situation neatly, to deal with the emergency.

4. The federation acknowledged that he was not using his siren immediately before the collision but that he sounded it a few second prior to the crash to warn other drivers of his approach. The federation noted that there was at least one other driver who was behind the driver who eventually collided with the grievant's vehicle who indicated to officers at the scene that he saw the grievant coming and noted that his lights were on. The obvious conclusion here is that a young, 17-year old driver, with several other young people in her car, was distracted and did not look to see the grievant coming and pulled out directly in front of him.

5. The grievant took immediate evasive action, but the crash was unavoidable as the other driver simply failed to look or yield and drove right into the side of the grievant's police vehicle.

6. The federation referred to the video and argued that the driver of the other car who pulled out into oncoming traffic, including the grievant's vehicle, which had its lights on, did not look to her right to see the grievant's vehicle coming. She then collided with the grievant's vehicle on the driver's side, disabling it. The federation asserted that the other driver was clearly at fault for this crash since she was at a stop sign and required to yield to oncoming traffic on Cedar Avenue.

7. The federation acknowledged that there was a technical violation of the siren policy but hotly disputed that a 10-hour suspension was warranted in this situation. The federation noted that the grievant was completely forthright and honest under Garrity during the investigation and gave a complete and accurate version of what happened.

8. The federation noted that Deputy Chief Glampe's initial impression of this after reviewing the video and the investigative reports was for no discipline at all. He indicated in a July 1, 2014 e-mail that he felt that a coaching would have been appropriate.

9. The federation noted that the department's reliance on state statute is misplaced and that the policy is outdated. The policy regarding use of sirens and lights has been in place since 1988 when state law required use of both lights and sirens when responding to an emergency. The operative statute, Minn. Stat. 169.17 was amended in 1997 to require the use of lights *or* a siren. Thus the grievant's actions were not out of compliance with state law as the City suggested.

10. The federation asserted that the grievant followed policy even though he did not use his sirens continuously. The policy requires that officers responding to an emergency use appropriate caution and the federation asserted that the grievant used his siren when approaching intersections or where he felt it was needed to alert the public of his approach. He further certainly exercised due caution for the safety of the public, slowing and taken evasive action when necessary to avoid traffic and pedestrians. Thus there was no true "violation" of the policy.

11. The federation also argued that good police work requires that officers have the discretion to bend policies from time to time and noted that officers frequently drive over the posted speed limits in order to respond to emergencies and that they also do not always use both lights and sirens for various purposes - such as getting there in a somewhat stealthier manner in order to apprehend a suspect before they hear the siren and flee.

12. The federation's main argument though was that the degree of discipline imposed was far too harsh and inconsistent with the disciplinary policy itself, which requires a review of both aggravating and mitigating factors to determine the appropriate level of discipline. Those factors as set forth in the disciplinary policy, Federation Exhibit 30, are as follows: Commendations, Prior Discipline, Seniority, Rank, Circumstances, Culpability, Employee Attitude, Performance Evaluations, Training, and Liability.

13. The federation asserted that there were no aggravating factors and several important mitigating factors that should be considered and that when one looks carefully at these, it is apparent that the 10-hour suspension cannot be sustained.

14. The grievant has several commendations for his past service, as noted above. That should be counted as mitigating factors.

15. There is no prior discipline – the federation argued that this is a mitigating factor. He has 21 years of service with the department – length of service is generally considered in mitigating discipline.

16. Rank – officers of higher rank are held to a higher standard of conduct but the grievant is a patrol officer and should not be held to a higher standard than any other patrol officer.

17. Employee attitude: the grievant was forthright and contrite in all his dealing with the investigation. He never tried to hide his actions or to minimize his role in this. He freely acknowledged that he did not use his siren continuously and explained why.

18. Circumstances and culpability – the federation noted that he was responding to an assault in progress – meaning he had to get there in a hurry in order to render assistance and try to apprehend the suspect. His intermittent use of the siren was an effort to do exactly what the department and the public expect of a police officer in this situation – get there in a hurry and catch the person doing the crime. There was also clear evidence in the federation's view that the young girl who pulled into him was responsible for the accident. She failed to yield to oncoming traffic after pulling away from a stop sign. Lights and sirens notwithstanding, she violated state statute by failing to yield to oncoming traffic, failed to keep a proper lookout and crashed into the side of a vehicle on the main road without even looking for him.

19. Performance evaluations – the federation noted that they are all good and that the grievant has been a good performer over his entire career. Training – the federation tied this into the discussion above regarding the lack of training on driving techniques but noted that he was not given any remedial training until after this incident. This not only is this not an aggravating factor it is a mitigating one in the federations; view and cannot be used to justify the suspension. The grievant was never disciplined or even coached after these other preventable accidents and they should not be used to suddenly create an aggravating factor here when they were not seen as major incidents at the time.

20. Liability – there was no claim made by any member of the public as the result of this collision and even though the grievant sustained a minor back injury he is back to work and has apparently recovered from the injury sustained in the crash of May 4, 2014.

21. The federation, as referenced above, also noted that the prior preventable accidents cannot be used to justify the suspension. The rules requires that for discipline to be imposed, remedial training must be given before such discipline can be imposed. Here the training was done well after this accident.

22. Further, the three-person disciplinary panel reviewed this entire scenario, including the dash cam video, the grievant's statements and the applicable policy and determined that a written reprimand was sufficient discipline to impose under these circumstances. The federation noted to that one of the members of that committee, a member of management, was at the hearing yet was not called to testify. He signed the recommendation for a written reprimand in this situation along with the other members of that committee.

23. The federation further noted that even the Disciplinary Matrix recognizes that "[t]he department recognizes that every discipline situation is different and that an employee's actions and history may worsen or improve the overall picture of misconduct." The federation asserted that when one considered the full record here, including the grievant's prior record and his actions taken that day in order to respond to an assault in progress as well as the initial recommendation for no discipline and the panel's recommendation for a written reprimand only, it is apparent that the 10-hour suspension is far too harsh and should be overturned.

The union seeks an award overturning the suspension, removing all record of discipline as the result of this incident and making the grievant whole.

MEMORANDUM AND DISCUSSION

FACTUAL BACKGROUND

There were few if any disputes over the material facts of this case. The grievant was doing routine patrol on May 4, 2014 when he received a call to respond immediately to an assault in progress. This could well have been a felony assault as far as the grievant knew at the time so he began making his way north on Cedar Avenue in Minneapolis, MN. Cedar Avenue is a busy thoroughfare even on a weekends and the video showed that traffic was heavy at times along his route.

He activated the emergency lights on his vehicle and these were shown to be on from the time he began responding to the call until the accident which occurred a few minutes later. The evidence showed, as the grievant freely acknowledged, that he did not use his siren continuously throughout the trip. A review of the video showed that he would use it intermittently when he got to intersections or when other drivers were on the road to alert them to his presence and of the need to move over to allow him to pass. He was also shown to slow down when approaching intersections in order to avoid traffic coming from the right or left who may not have been able to see his lights and to use caution for any pedestrians or others who may be on or near the streets.

The crash occurred at the intersection of 33rd Street and Cedar Avenue. The video showed quite clearly that he did not have his siren on until he got very close to that intersection and then not until the driver of a vehicle pulled out from the grievant's left into traffic. The video showed that vehicles were parked on the southbound parking lane and that it would have been difficult for a driver to see around them. The reasonable inference is that the young driver may have looked and did not see the grievant coming due to the parked vehicles in her sight lines.

She did not look to her right as she pulled into the lane of travel and it was then that the grievant activated the siren but by then it was too late. The young driver was going too fast and neither vehicle was able to stop or swerve away fast enough or far enough to avoid the crash. The other drive hit the driver's side of the grievant's vehicle disabling them both. The grievant immediately called the crash in and had to stop the response to the assault even though he was about a half mile away from it.

No one in the other driver's vehicle was hurt but the grievant complained of some back pain shortly after the accident. He sought treatment but the record here showed that he was able to return to work shortly afterward. There was damage to the police vehicle that had to be repaired but no other liability claims were shown here.

The grievant has two prior preventable accidents on his record both from approximately 6 months before this incident and both apparently related to sliding on black ice. There was no evidence that he was given remedial driving training after these and no evidence of any disciplinary consequences or even coaching following those two incidents. As discussed below, it was apparent form the record that these prior accidents factored into the decision to reject the recommendation of the disciplinary panel and impose the greater discipline in this case.

The incident was investigated and the grievant was interviewed under Garrity. The evidence showed that he was forthright with the investigators and told them what had happened. He was also truthful when asked about the use of his siren and acknowledged that he had used it intermittently, just as the video showed. He asserted that he used the siren sparingly so as not to alert the assailant of his impending approach.

The parties spent considerable time arguing over whether this was a sound decision in that the siren could certainly have caused the assailant to flee which would have perhaps made it more difficult to find and apprehend that person but could also certainly have stopped the assault. It would be pure speculation at this point to try to determine which was the more rational approach. What was clear was that the policy requires use of sirens and lights when responding to an emergency and that the grievant did not follow that procedure.

The evidence showed Deputy Chief Glampe was advised of this and sent an e-mail in which he opined initially that the matter sounded like a coaching session was warranted. The federation asserted that this was conclusive evidence that the department subverted the process but the message also showed that Deputy Chief Glampe may not have been fully aware of all of the circumstances at the time he sent that e-mail. On this record that e-mail message alone was not conclusive.

The matter was reviewed by a three-person disciplinary committee, comprised of Inspector Sullivan, Lt. Fossum, and Lieutenant May. Two of these individuals were bargaining unit members but all were experienced and responsible members of the Minneapolis Police Department and they unanimously agreed that the discipline should be a written reprimand for the failure to follow the lights and siren policy set forth above. This recommendation was forwarded to Deputy Chief Glampe on January 30, 2015 – some 6½ months after the e-mail of July 1, 2014.

There was some troubling evidence regarding what happened next. The evidence showed that Assistant Chief Clark who did not testify at this hearing, stated that he agreed with a sustained "B" violation and a 10 hour suspension based on the number of preventable accidents in 2013 and "points outlined in DC Glampe's memo." Clark signed and dated the document on March 4, 2015. The somewhat confusing evidence showed that Deputy Chief's memo recommending the 10-hour suspension was dated March 16, 2015, almost two weeks after Assistant Chief Clark's message that he agreed with the 10-hour suspension. It was not clear how these dates could be accurate or whether there was a foregone conclusion regarding the suspension. The department claimed that there must simply be a typo on the dates and that could certainly have been the case. There was also evidence that the grievant's work record may not have been thoroughly reviewed when deciding to impose the suspension. On this record it was not clear what exactly happened or what the exact time line was. What was clear was that the disciplinary panel's recommendation for a written reprimand was rejected in favor of the suspension.

It was also clear that the prior preventable accidents were considered in determining the discipline even though no prior discipline, coaching or remedial training had been given to the grievant prior to the May 4, 2014 incident.

Based on this the department determined to impose the 10-hour suspension and the federation grieved this. The matter proceeded through the appropriate grievance steps to hearing. It is against that factual backdrop that the analysis of the matter proceeds.

WAS THERE A VIOLATION OF THE POLICY?

As noted above, the policy 7-403 provides as follows: "All MPD officers shall use red lights and sirens in a continuous manner for any emergency driving. Officers responding to a Code 3 emergency shall exercise caution and due consideration for the safety of the public."

The federation raised a somewhat clever but ultimately unpersuasive argument that the grievant did not actually violate the policy. The argument was that nothing in the policy explicitly requires that the siren be used continuously but rather only when necessary to protect the public and to safely cross intersections or areas where the officer feels it is necessary. The crux of this argument appears to be that if the officer responding to an emergency is exercising caution and due consideration for the safety of the public, as required by the second cited sentence above, that officer is somehow absolved of the responsibility for compliance with the first sentence cited above.

That is not what the language says nor is what it clearly means.

The federation's argument in this regard was inconsistent with the clear terms of the policy and must be rejected as inconsistent with the clear terms of the policy. Simply stated, the policy does require that the siren be used "continuously" when responding to an emergency. To read it the way the federation suggests would be an amendment to a public employer's policy that an arbitrator has no power to do. On this record, it was clear that the grievant, while well-meaning, violated the policy.

CONSISTENCY WITH STATE STATUTES

The federation noted that the policy in place regarding use of sirens is outdated and old. Since it has been in place since 1988. Federation noted that the policy was consistent with state law in 1988 but that law changed in 1997 to allow for use of lights or sirens in responding to an emergency situation. See, Minn. Stat. 169.17, which provides as follows: "law enforcement vehicles shall sound an audible signal by siren *or* display at least one lighted red light to the front." (Emphasis added.)

While the facts here show that the grievant was in compliance with state law, he was not however in compliance with the City of Minneapolis Police Department policy. State law may well set a minimum standard for safety but a City is free to dictate a more stringent policy to ensure the safety of the public or its employees. Here while the policy is different from the state law, it is not inconsistent with or in violation of it. Thus the policy is still quite valid. Further, it is not for an arbitrator to dictate to a public employer what its policies should be unless there are clearly in violation of or in violation of applicable law. Here no such evidence was presented.

On this record, the change in statute did not control the result. What does is the policy. As noted above, it was clear that the grievant violated the policy. The remaining question is whether the degree of discipline imposed was appropriate under these circumstances.

WAS THE DEGREE OF DISCIPLINE IMPOSED APPROPRIATE UNDER THESE FACTS?

One of the time honored tests of just cause is the determination of the appropriate penalty, given all of the facts and circumstances of a particular case. While arbitrators should be cautious in changing the penalty imposed by management once there has been a finding that there was a violation of a legitimate and appropriate rule so as not to substitute one's own judgment for that of management, arbitrators can and frequently do review the penalty, even in cases of short suspensions in order to determine just cause for that penalty. Here that power is supported by the terms of the disciplinary policy itself. The policy calls for this to be a class B offense and carries with it a presumptive 10-hour suspension. That however is not absolute. It is subject to the just cause analysis and, more to the point, can be adjusted up or down depending on the factors listed above in the federations contentions.

The parties discussed the various factors and whether they were aggravating or mitigating. This case warrants some discussion of each of them as well but on balance it was clear on this unique record that far more of them mitigated in favor of the grievant than were found to be aggravating.

The factors again are as follows: Commendations, Prior Discipline, Seniority, Rank, Circumstances, Culpability, Employee Attitude, Performance Evaluations, Training, and Liability. See Federation Exhibit 31.

The grievant has several commendations for his exemplary service. These are several years old but the policy itself does not delineate how old they must be before they are not to be given any weight or not considered at all. Their age was certainly considered but since there was no discipline, discussed below, or other problems with the grievant's employment history in the interim, this was a factor that weighed in his favor.

Prior discipline: There was none shown and this was clearly a factor in the grievant's favor.

Seniority: This too was a factor in the grievant's favor. The department argued that his long tenure showed that he was also aware of the rule and that he should therefore have known not to respond without his siren. This was admittedly a close call but 21 years of good service is a factor that weighed in the grievant's favor.

Rank: The grievant is a patrol officer and therefore held to the same standard of conduct as other patrol officers. This frankly was a neutral factor. All patrol officers should know and follow department rules. The fact that he is not held to some higher standard was a non-factor here.

Circumstances: This too weighed slightly in the grievant's favor. He was responding to what could well have been a felony assault in progress – that latter piece was important. On the other hand traveling at 48 MPH on Cedar Avenue in somewhat heavy traffic was a factor that weighed against the grievant. He frankly should have been much more attentive to having the siren on in that kind of traffic at that time of day. This was a factor that weighed slightly against the grievant in this case.

Culpability: This was a factor that clearly weighed in favor of the grievant. The video shows the other car pulling out from a side street with a stop sign and failing to yield to incoming traffic. While the grievant should have had his siren on too, he did have his lights on and the other driver failed to even look for those. This was a clear factor in the grievant's favor here.

Employee Attitude: This was also a clear factor in the grievant's favor. He was completely forthright and truthful, honest and contrite throughout this proceeding. He was very truthful in the hearing and by all accounts throughout the investigation as well.

Performance Evaluations: these were shown to be quite good. This was a factor that either weighed in the grievant's favor or were at least neutral. These were certainly not aggravating factors.

Training: the federation made much of the fact that the grievant was not given remedial driving training until after this incident. This was frankly something of a non-factor here – at least a neutral one. He was not given remedial driving training but one might well ask, do you really need remedial driving training to follow the policy on using the siren in this type of situation? The grievant knew that policy yet decided not to follow it for the reasons set forth above. The best that can be said here is that it is highly unlikely that the grievant will repeat this behavior should a similar situation arise in the future. On this record, this factor was thus considered somewhat neutral.

Liability: None was shown here other than the damage to the police vehicle and some medical bills for the grievant's back injury sustained in the accident. There was no other showing of liability here and no evidence of a claim filed by the other driver or anyone else involved in the crash. This too was something of a neutral factor and did not weigh heavily one way or the other.

On balance, there were more factors that mitigated the discipline imposed than aggravating ones. The policy does not appear to be one that measures each of those factors scientifically or is a mathematical calculation where each factor is given equal weight and if there are more in favor of mitigation that aggravation the result must be a reduction of the discipline. The plain reading of the policy does not appear to work that way. Some discretion is and must be given to the department to determine if any deviation up or down from the presumed penalty. That discretion though is passed on to the arbitrator as part of the just cause analysis and the factors should therefore be considered as part of that analysis. Here those factors showed that the penalty should be adjusted down.

The most important factor on this unique record was the recommendation of the discipline panel. It was clear that they reviewed the entire case and while their recommendation is not binding, it did carry some weight here.

One final matter was that it was clear that the decision to impose the 10-hour suspension appeared to be based to some degree on the prior preventable accidents. While those might be considered as part of the "circumstances" factor it was not clear what was involved in those mishaps. On this unique record, those were not given great weight.

Based on the totality of the evidence it is determined that the grievant violated the lights and siren policy but that the factors listed in the discipline policy and the overall record supported the federation's claim for a reduction in the penalty. The federation claimed that there should be no penalty at all but that was not appropriate given the facts here. The 10-hour suspension is hereby overturned and replaced with a written reprimand, per the recommendation of the disciplinary panel discussed above. . The grievant's disciplinary record is to be amended to reflect this award and the City is ordered to make the grievant otherwise whole for lost back pay and contractual benefits pursuant to this award.

AWARD

The grievance is SUSTAINED IN PART AND DENIED IN PART. The 10-hour suspension is overturned and replaced with a written reprimand. The grievant is entitled to reimbursement for all lost pay and contractual benefits as a result of the action herein and his official record of discipline is to be amended to reflect this award.

Dated: December 30, 2015

Jeffrey W. Jacobs, arbitrator